United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–116–90
MAHADEV SHANKAR J
30 MARCH 1994

Bankruptcy *— Capacity of bankrupt — Whether could be appointed representative of deceased wife's estate — Whether had locus standi to appear in application for order for sale against wife's estate — Bankruptcy Act 1967 s 31(a)*

Civil Procedure *— Costs — Taxation — Solicitor and client basis — Intervener proceedings an unwarranted intrusion — Interveners to pay chargee's costs*

Civil Procedure *— Parties — Description of defendant — 'Personal representative' of wife's estate and not 'representative' — Whether action defective — Whether a bankrupt can be appointed representative — Bankruptcy Act 1967 s 31(a) — Subordinate Courts Rules 1980 O 8 r 14*

Civil Procedure *— Parties — Intervention — Whether can be applied for after order for sale perfected — Rules of the High Court 1980 O 15 r 6(2)(b)*

Contract *— Security — Deposit of shares — Whether bank obliged to sell shares to minimize loss to borrower — Whether bank obliged to sell at particular time*

Land Law *— Charge — Order for sale — Stay of execution — Whether land belonged to unregistered third parties — Effect of appointment of deceased owner's husband (a bankrupt) as representative of her estate — Whether land vested in Official Assignee*

Land Law *— Charge — Order for sale — Third party charge executed by wife of debtor — Effect of debtor's bankruptcy on order for sale — Whether provisions of Bankruptcy Act 1967 applicable — Whether chargee's claim limited to amount owed at date of bankruptcy — Bankruptcy Act 1967 ss 8 & 43*

Succession *— Administration — Appointment of 'representative' on creditor's application — Whether action instituted by creditor against 'personal representative' was defective — Whether deceased's bankrupt husband could be appointed representative — Bankruptcy Act 1967 s 31(a) — Subordinate Courts Rules 1980 O 8 r 14*

The plaintiff ('the bank') had granted an overdraft facility to A Subramaniam ('the borrower'), who was the husband of Roshammah ('the deceased') on the security of a lien holder's caveat executed by the deceased as registered owner of certain land ('the land'). The borrower was subsequently adjudicated a bankrupt. Following the deceased's death, the borrower was appointed as representive of the deceased's estate upon the bank's application. The bank obtained judgment for RM50,324.31 against the deceased's estate and applied under s 281(2) of the National Land Code 1965 for an order of sale. The borrower was named as defendant in his capacity as the personal representative of the estate.

Two days before the auction, the deceased's children ('the interveners') applied for a stay pending their application to be substituted or added as defendants on the grounds, inter alia, that: (i) they were part owners of the land; (ii) the judgment was defective because it described the borrower as 'personal representative' and not 'representative'; (iii) the bank could not obtain an order for sale as the land had passed to the borrower, as husband of the intestate deceased, and vested in the Official Assignee; (iv) the bank could not claim more than the sum owed on the date of the borrower's bankruptcy under s 43 of the Bankruptcy Act 1967; and (v) by selling the security in the form of shares deposited by the borrower only in 1991, the bank had caused the borrower unnecessary loss.

Held, dismissing the interveners' application:

(1) There was no evidence to support the interveners' allegation that they were part owners of the land. The deceased was registered as the owner of the land and the bank were bona fide purchasers of their interest for value and without notice.

(2) Executors and administrators are collectively described as personal representatives of deceaseds' estates and O 8 r 14 of the Subordinate Courts Rules 1980 indicates that proceedings may be initiated against a person appointed to represent the estate. Although the borrower was bankrupt, s 31(a) of the Bankruptcy Act 1967 empowers a court to allow a bankrupt to manage the business of his spouse.

(3) The deceased had encumbered the land in her lifetime and the property could only pass subject to the encumbrance. The land did not vest in the Official Assignee as it did not concern the personal bankruptcy of the borrower. Furthermore, the judgment was clearly to be enforced against the deceased's estate.

(4) The bank's claim was not against the bankrupt borrower and as s 43 of the Bankruptcy Act 1967 refers to debts proved upon the bankrupt's estate, it is inapplicable. Furthermore, s 8 of the Bankruptcy Act 1967 did not preclude the bank from recovering against the deceased's estate as the bank was a secured creditor and the judgment debt of the deceased's estate was not provable in the borrower's bankruptcy.

(5) It is well established that a banker has a right to sue a guarantor without resorting to the security deposited by the borrower and a bank can elect when it wishes to dispose of its security.

(6) The order of sale is a final order unless appealed against. Once it is made, drawn up and perfected, the court is functus officio and has no power to set it aside. Under O 15 r 6(2)(b) of the Rules of the High Court 1980, intervention must be applied for before the final order is made and a person is a proper party only if his presence before the court is imperative for the adjudication.

(7) As this purported intervention was an unwarranted intrusion which the interveners could not have believed was an arguable case, the interveners were to be jointly and severally liable for the costs of the bank to be taxed on a solicitor and client basis.

[Bahasa Malaysia summary

Plaintif ('bank itu') telah memberikan suatu kemudahan overdraf kepada A Subramaniam ('peminjam itu'), yang merupakan suami Roshammah ('si mati itu') atas jaminan suatu kaveat pemegang lien yang disempurnakan oleh si mati sebagai pemunya berdaftar sebidang tanah tertentu ('tanah itu'). Peminjam itu kemudiannya dijadikan seorang bankrap. Berikutan kematian si mati, peminjam itu telah dilantik sebagai wakil harta pusaka si mati atas permohonan bank itu. Bank telah mendapatkan penghakiman untuk jumlah RM50,324.31 terhadap harta pusaka si mati dan memohon di bawah s 281(2) Kanun Tanah Negara 1965 untuk suatu perintah jualan. Peminjam telah dinamakan sebagai defendan dalam keupayaannya sebagai wakil diri harta pusaka si mati.

Dua hari sebelum lelong itu, anak-anak si mati ('pencelah itu') telah memohon untuk suatu penggantungan semasa menunggu permohonan mereka untuk diganti atau dicantumkan sebagai defendan atas alasan, antara lain, bahawa: (i) mereka merupakan pemunya sebahagian daripada tanah itu; (ii) penghakiman itu cacat kerana ia menyifatkan peminjam itu sebagai 'wakil diri' dan bukan sebagai 'wakil'; (iii) bank tidak boleh mendapatkan suatu perintah jualan kerana tanah itu telah beralih kepada peminjam itu, sebagai suami si mati yang tidak berwasiat, dan diletakhak pada Pegawai Pemegang Harta; (iv) bank tidak boleh menuntut lebih daripada jumlah yang dihutang pada tarikh kebankrapan peminjam itu di bawah s 43 Akta Kebankrapan 1967; dan (v) dengan menjualkan cagaran dalam bentuk saham yang didepositkan oleh peminjam itu hanya dalam tahun 1991, bank itu telah mengakibatkan kerugian yang keterlaluan kepada peminjam itu.

Diputuskan, menolak permohonan pencelah itu:

(1) Tidak terdapat keterangan untuk menyokong pengataan pencelah itu bahawa mereka merupakan pemunya sebahagian tanah itu. Si mati telah didaftarkan sebagai pemunya tanah itu dan bank itu merupakan pembeli kepentingan mereka yang bona fide dengan nilai dan tanpa notis.

(2) Wasi dan pentadbir secara kolektif dikenali sebagai wakil diri harta pusaka orang yang meninggal dunia dan A 8 k 14 Kaedah-Kaedah Mahkamah Rendah 1980 menunjukkan bahawa prosiding boleh dimulakan terhadap seorang yang dilantik untuk mewakili harta pusaka itu. Walaupun peminjam merupakan seorang bankrap, s 31(a) Akta Kebankrapan 1967 memberi kuasa kepada

mahkamah untuk membenarkan seorang bankrap menguruskan hal pasangannya.

(3) Si mati telah membebankan tanah itu dalam hidupnya dan harta itu hanya boleh beralih tertakluk kepada bebanan itu. Tanah itu tidak terletakhak pada Pegawai Pemegang Harta kerana ia tidak kena-mengena dengan kebankrapan peribadi peminjam. Lebih-lebih lagi, penghakiman itu jelas boleh dilaksanakan terhadap harta pusaka si mati.

(4) Tuntutan bank itu bukan terhadap peminjam yang bankrap itu dan oleh kerana s 43 Akta Kebankrapan 1967 merujuk kepada hutang yang dibuktikan terhadap estet seorang bankrap, ia tidak terpakai. Lagipun, s 8 Akta Kebankrapan 1967 tidak menghalang bank itu daripada mendapat balik wangnya daripada harta pusaka si mati kerana bank itu merupakan suatu pemiutang bercagar dan hutang penghakiman harta pusaka si mati itu tidak boleh dibuktikan di dalam kebankrapan peminjam itu.

(5) Adalah mantap bahawa sesuatu bank mempunyai hak untuk mendakwa seorang penggerenti tanpa menggunakan cagaran yang didepositkan oleh peminjam itu dan bank itu boleh memilih masa bila ia ingin menjualkan cagarannya.

(6) Perintah jualan itu adalah suatu perintah muktamad kecuali jika rayuan dibuat terhadapnya. Sebaik sahaja ia dibuat dan disempurnakan, mahkamah menjadi functus officio dan tidak mempunyai kuasa untuk mengetepikannya. Mengikut A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980, pencelahan mesti dipohon sebelum perintah muktamad dibuat dan seseorang itu merupakan suatu pihak yang patut hanya jika kehadirannya di hadapan mahkamah itu penting sekali untuk penghukuman.

(7) Oleh kerana campur tangan ini merupakan suatu gangguan yang tidak wajar yang pencelah itu tidak mungkin mempercayai adalah suatu kes yang boleh dihujahkan, pencelah itu mesti menanggung liabiliti bersesama dan berasingan untuk kos bank itu yang akan ditetapkan atas dasar peguamcara dan klien.]

Notes

For cases on the capacity of a bankrupt, see 1 *Mallal's Digest* (4th Ed) paras 971–975; [1992] Mallal's Digest 97.

For cases on orders for sale, see 8 *Mallal's Digest* (4th Ed) paras 1111–1118; [1992] Mallal's Digest 1213, 1247–1258.

For cases on intervention, see 2 *Mallal's Digest* (4th Ed) paras 1609–1616; [1991] Mallal's Digest 380; [1992] Mallal's Digest 309–310.

For cases on administration of estates, see 11 *Mallal's Digest* (4th Ed) paras 1427–1489.

For a case on deposit of shares as security, see 3 *Mallal's Digest* (4th Ed) para 1506.

Cases referred to

Arab-Malaysian Finance Bhd v Ampang Granite Sdn Bhd & Anor [1994] 1 AMR 11:585 (refd)

Chinese Tin Mines Rehabilitation Loans Board v Official Assignee, FM [1957] MLJ 65 (folld)

Ewart v Latta (1865) 4 Macq 983 (refd)

Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (folld)

Perwira Habib Bank (M) Bhd v Wastecol Manufacturing Sdn Bhd & Ors [1988] 3 MLJ 215 (refd)

Legislation referred to

Bankruptcy Act 1967 ss s 8, 27, 31(a), 43, 114
National Land Code 1965 s 281(2)
Rules of the High Court 1980 O 15 r 6(2)(b)
Subordinate Courts Rules 1980 O 8 r 14

K Maniam (*Sykt KL Rekhraj*) for the plaintiff.
S Shanmugam (*Alex & Rakan-Rakan*) for the defendant and interveners.

Cur Adv Vult

Mahadev Shankar J: This case is about a borrower and his family who did everything they could to frustrate a bank from selling their home to pay off a judgment debt.

Roshammah a/p Samuel ('the deceased') was the registered owner of the land held under State Lease 1446 Lot No 297 in PJ ('the said land'). On it is a house No 33 Jalan 1/2, Petaling Jaya ('the said house'). The deceased's husband, A Subramaniam aka AS Maniam ('the borrower'), is a contractor. Their two daughters and two sons ('the interveners') live in the said house.

In 1982, the borrower approached the bank for credit facilities. The bank wanted security. So the deceased executed a lien holder's caveat and deposited the title to the said land with the plaintiff (the bank). The deceased also executed a personal guarantee.

Thereupon the borrower was given overdraft facilities on his current account with the bank which he fully utilized. The borrower bought shares and deposited three lots with the bank as additional security to allow him to continue the overdraft.

The borrower did not pay his taxes. The Department of Inland Revenue took out a bankruptcy notice and served it on the borrower. This was followed by a creditor's petition. On 5 March 1984, the borrower was made a bankrupt.

It is a criminal offence for a bankrupt to obtain credit without the permission of the Official Assignee. The borrower did not tell the bank he had been made a bankrupt. On the date of his bankruptcy, he owed the

bank RM7,794.54. Immediately thereafter, he increased his indebtedness by drawing on the overdraft day by day till it became RM21,812.72 by the end of the month. He continued to operate this account until 27 August 1984 when the balance stood at RM23,958.61.

On that date, the bank were notified by the Official Assignee of the bankruptcy. The bank immediately froze the account and ruled it off. What should have happened next was for the bank to realize its security or give it up and prove in the bankruptcy. Unfortunately, the deceased who was ill with cancer died on 13 November 1986. The family did not apply for letters of administration. Eventually in 1989, the bank filed an action in the sessions court where the borrower was formally appointed to represent the estate of the deceased. On 11 January 1990, the bank obtained judgment for RM50,324.31 being the amount due at the date of the institution of the action and with interest thereafter and costs. The order specifically provided that it was to be levied against the real and personal estate of the deceased.

The bank then filed this originating summons under s 281(2) of the National Land Code 1965 for an order of sale. The borrower was named as the defendant in his capacity as the personal representative of the estate. He was served but did not enter appearance. The notice of appointment to hear this originating summons was also served upon him.

At the first hearing, he appeared with the Official Assignee and the matter was adjourned. At the second hearing, he again appeared with the Official Assignee. This was on 31 January 1991. The Official Assignee disclaimed any interest in the said land as it had nothing to do with the personal bankruptcy of the borrower. The court accordingly made an order in terms of the application for the recovery of the amount due to the bank with continuing interest and costs. The auction was fixed for 6 May 1991. This order was not appealed against. It was duly perfected and extracted on 20 February 1991.

The summons for directions was then taken out and served on the defendant and the order made on 19 March 1991. The bank produced a valuation report and the licensed auctioneer issued the proclamation. All was set for the sale to go on.

At all times material to these proceedings, the borrower and the interveners were living in the said house. They were well aware of what was going on.

Two days before the sale was to take place, these interveners filed a summons-in-chambers asking for the sale to be stayed pending the disposal of their application to be substituted or added as defendants and for such other relief as may be just. The affidavit-in-support filed by all four of them claimed that before the lien holder's caveat was registered they were part owners of the said land by virtue of a payment of RM25,000 to the deceased, that the order of sale was unlawful because the borrower was bankrupt and had no locus standi, that all proceedings in this matter should have been served on the Official Assignee, that this originating summons had not been served in the time prescribed therefor and that the

bank had not made full disclosure of the shares which had been pledged by the borrower as additional security.

With considerable regret, I granted the stay subject to terms that a sum of RM25,000 be deposited in court as security for the costs and expenses of the aborted auction. This was done on 17 May 1991. The interveners were added as defendants. Thereafter further affidavits were filed by the borrower, the interveners and the bank.

Counsel for the interveners raised the following issues.

First, it was contended that the judgment obtained by the bank against the deceased's estate was defective because it directed the borrower as personal representative of the deceased's estate to pay the bank the amount adjudged. It was submitted that the defect was in wrongly describing him as 'personal representative' when he should have correctly been described as 'representative'. I reject this submission out of hand. Executors and administrators are collectively described as personal representatives of deceaseds' estates, and the defendant was named as such in the title to these proceedings. The Subordinate Courts Rules 1980, O 8 r 14 reads as follows:

> (1) Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative, the Court may ... in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceedings; and any such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings.
>
> (2) Before making an order under this rule, the Court may require notice of the application for the order to be given to such (if any) other persons having an interest in the estate as it thinks fit.

The rule indicates that proceedings may be initiated, as was done in this case, against a deceased's estate in the absence of a person representing the estate, and a person appointed in the proceedings, as was done here, to represent the estate. The judgment made it clear that it was to be enforced against the assets of the deceased's estate.

Earlier the borrower had tried to get out of the representation order by claiming he was a bankrupt at the time. But s 31(a) of the Bankruptcy Act 1967 specifically empowers a court to allow a bankrupt to manage the business of his spouse.

The second contention was that as the deceased died intestate her property had passed to the borrower. Since he was already a bankrupt it was said that the said land had vested in the Official Assignee and therefore the bank could not obtain an order for sale! This argument is unworthy of any attention. The deceased had encumbered the said land in her lifetime and the property could only pass subject to the encumbrance.

The third point was that the bank could not claim for repayment of a principal sum in excess of that owed on the date of his bankruptcy (ie RM7,794.54), by reason of s 43 of the Bankruptcy Act 1967. This borrower knowingly and without informing the bank of his bankruptcy continued to operate his bank account, and increased his indebtedness to the limit of his overdraft, until the bank froze the account immediately it was informed by the Official Assignee of the adjudication and receiving orders. That this happened only on 28 August 1984 also suggests that the borrower did not promptly disclose his affairs to the Official Assignee as he was bound to do so in law. These are acts punishable under the Bankruptcy Act 1967 (see ss 27 and 114 of this Act). The bank acted in good faith and without notice. Since the bank is a secured creditor and the judgment debt of the deceased's estate to the bank is not provable in the bankruptcy, I do not think s 8 of the Act precludes the bank from effecting recovery against the deceased's estate (as opposed to the borrower's debt to the bank as to which I make no finding here). As for the interest accruing due from the date of the bankruptcy it was submitted that by virtue of s 43(6) of the Act, the interest should be only 6%pa. Again counsel for the interveners has blinded himself to s 43(6) which refers to debts 'proved upon a debtor's estate'. The bank's claim here is not against the bankrupt borrower. A secured creditor who does not prove in the bankruptcy, cannot be deprived of the interest which the law and his contract allows him: See *Chinese Tin Mines Rehabilitation Loans Board v Official Assignee, FM* [1957] MLJ 65.

The fourth issue raised by the interveners was that the bank held additional secury by way of the three lots of shares deposited by the borrower in October 1983 and that by only selling them in 1991, the bank had caused the borrower unnecessary loss. On the facts, this is a highly speculative submission because there is no evidence whatsoever as to when it is being alleged the shares should have been sold. As a matter of law however, it is well established that a banker has a right to sue a guarantor without resorting to the security deposited by the borrower: See Paget, *Law of Banking* (10th Ed, 1989) at pp 606 and 607 and *The Modern Contract of Guarantee* (1992) by Phillips and Donovan at p 460 where the case of *Ewart v Latta* (1865) 4 Macq 983 is discussed. See also *Perwira Habib Bank Malaysia Bhd v Wastecol Manufacturing Sdn Bhd & Ors* [1988] 3 MLJ 215. See also *Arab-Malaysian Finance Bhd v Ampang Granite Sdn Bhd & Anor* [1994] 1 AMR 11:585 at p 585 where Siti Norma Yaakob J held that a bank can elect when it wishes to dispose of its security.

The last issue raised was a claim that in 1982, the interveners 'advanced' RM20,000 to the deceased (their mother) for the purchase of the said land and house, that the deceased promised to transfer the property to them and therefore the house was theirs. This nebulous claim has all the marks of another afterthought. Apart from the bare assertion, there is not a shred of evidence to support it, nor did the interveners take any steps to protect their equity if by some remote chance they could be believed on this issue. In their affidavit, the claim was only to half the property. It is not irrelevant that the borrower makes no mention of the alleged transfer anywhere in these proceedings. The deceased was registered

A as the entire owner of this land. The bank were bona fide purchasers of their interest for value and without notice. I therefore reject this submission also.

The order of sale which the interveners are now seeking to set aside is a final order unless appealed against. Once it was made, drawn up and B perfected, this court is functus officio and has no power to set it aside. It was so held by the Supreme Court in *Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642. In that case the public auction was completed. Thereafter the registered owner purported to sell the land to the intervener. To that extent the facts can be distinguished because in our case the interveners sought to come in two days before the sale actually C took place. Should they have been permitted to do this? I hope enough has been said to demonstrate to conclusion that this purported intervention should never have seen the door of this court.

Intervention to be legitimate must qualify with the conditions prescribed by O 15 r 6(2)(b)(i) or (ii) of the Rules of the High Court 1980.

D It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted. Secondly, a person can only be regarded as a proper party if his presence before the court is imperative for the adjudication. In a general sense what this means is that the intervener must E have a direct legal or financial interest in the action. The only party who had such an interest in this case was the estate of Roshammah a/p Samuel (deceased), and nobody else. The borrower was regularly appointed as the representative of the estate. In so far as the bankruptcy of the borrower was concerned, as between himself and his creditor, he alone had such an interest. The receiving and adjudication orders were res judicata.

F How the interveners and their advisors took it upon themselves to try and reopen issues which had been settled in the bankruptcy proceedings and in the judgment which led to the final order of sale being made defies the rules relating to both procedure and substance. This purported intervention was an unwarranted intrusion for which the interveners must G pay the price. I now dismiss their application. I order each of the interveners to be jointly and severally liable for the costs of the bank. I further order that the costs be taxed on a solicitor and client basis because I do not think the defendants and their advisors could have believed that they had an arguable case. I also order that the sale of the subject property be held on 25 July 1994 and that the first defendant and the interveners and any other H persons who are in the said house do vacate the same on a date to be nominated by the bank to whom I give liberty to apply for any further direction required to complete the sale by public auction.

Finally I order that the sum of RM2,500 deposited by the interveners be paid out to the bank towards satisfaction pro tanto of their taxed costs, I and the balance, if any, be refunded to them.

Order accordingly.

Reported by Anne Khoo